

FILED BY CLERK

FEB -8 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0046
	)	DEPARTMENT A
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
IVAN SHAWN SAMS,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054999

Honorable John F. Kelly, Judge  
Honorable Richard S. Fields, Judge

AFFIRMED AS CORRECTED

Thomas C. Horne, Arizona Attorney General  
By Kent E. Cattani and David A. Sullivan

Tucson  
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender  
By Scott A. Martin

Tucson  
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Ivan Sams was convicted of aggravated assault with a deadly weapon, a dangerous-nature offense, and sentenced to a slightly mitigated,

seven-year prison term.<sup>1</sup> As the sole issue raised on appeal, Sams argues the trial court erred in denying his motion to strike for cause a venireperson who was employed as a prosecutor with the United States Attorney’s office, previously had been employed as a prosecutor with the Pima County Attorney’s office, and was married to a Deputy Pima County Attorney at the time of trial. He asks us to reverse his conviction and sentence and remand the case for a new trial.

¶2 After the trial court denied his motion to strike for cause, Sams used a peremptory strike to remove the prospective juror from the panel. Sams acknowledges that, under existing Arizona law, “the curative use of a peremptory challenge” to remove a juror the trial court has declined to strike for cause is “subject to harmless error review,” meaning “a defendant in a criminal case must show prejudice.” *State v. Hickman*, 205 Ariz. 192, ¶¶ 28 & 31, 68 P.3d 418, 424-25 (2003); accord *State v. Moore*, 222 Ariz. 1, ¶ 96, 213 P.3d 150, 167 (2009) (“If a defendant is forced to use a peremptory challenge to remove a juror who should have been excused for cause, an otherwise valid conviction will not be reversed unless the defendant shows prejudice.”).

¶3 Sams does not claim his curative use of a peremptory challenge rendered him unable to secure a fair and impartial jury. Instead, he urges this court to “reconsider the . . . harmless error paradigm” applied in *State v. Eddington*, 226 Ariz. 72, ¶¶ 19-20, 244 P.3d 76, 83 (App. 2010), *aff’d*, 574 Ariz. Adv. Rep. 15, ¶ 19 (Dec. 20, 2011);

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<sup>1</sup>Although the trial court’s sentencing minute entry indicates Sams’s conviction was for a “nondangerous, nonrepetitive offense,” the court stated at sentencing that it was sentencing Sams under former A.R.S. § 13-604, which provided enhancements for dangerous offenses; the jury found the offense was of a dangerous nature, as Sams acknowledges; and the sentence imposed by the court is consistent with that finding. See 2005 Ariz. Sess. Laws, ch. 188, § 1 (former § 13-604(I)). By this memorandum decision, we correct the court’s minute entry to reflect Sams’s conviction for a dangerous-nature offense.

“employ the traditional harmless error analysis” exemplified by *State v. Miller*, 178 Ariz. 555, 560, 875 P.2d 788, 793 (1994); and “find that the State has not proven the error harmless beyond a reasonable doubt.”

¶4 We agree with the state, however, that the “harmless error review” relevant in this context is the analysis set forth in *Hickman*, 205 Ariz. 192, ¶¶ 28 & 31, 68 P.3d at 424, 425. This court has “no authority to overrule, modify, or disregard” that decision by our supreme court. *City of Phx. v. Leroy’s Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).

¶5 Sams has not claimed, much less established, that the curative use of his peremptory challenge denied his right to be tried by an impartial jury. He therefore has waived that argument on appeal. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (“Failure to argue a claim usually constitutes abandonment and waiver of that claim.”). Accordingly, we decline to consider the merits of Sams’s allegations of error.

¶6 For the above reasons, Sams’s conviction and sentence are affirmed, as corrected.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.